IN THE HIGH COURT OF DELHI

Crl.M.C.4872/2005 & Crl.M.C. 4855/2005

Jasbir Singh ..... Petitioner
! through: Mr. Yogesh Kumar Saxena, Advocate

VERSUS

$ N.C.B. ..... Respondent
^ through: Mr. Satish Aggarwala, Advocate

RESERVED ON: 13.08.2007

% DATE OF DECISION: *30*.08.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: PRADEEP NANDRAJOG, J.

1. By above captioned petitions under Section 482 of the Code of Criminal Procedure petitioner is seeking recall of 2 orders of even date i.e. 6.8.2005 passed by the Court of Special Judge, NDPS, Delhi.

2. On 20.11.1987 Drug Enforcement Administration Officials, USA seized narcotic drugs from 2 Indians and

informed Narcotics Control Bureau about the same. On 22.6.1988 NCB, Delhi filed a complaint against 6 persons including petitioner under Section 21, 23 and 29 of the NDPS Act, 1985.

3. Facts pertaining to Crl.M.C. 4872/2005 are that on 18.5.2005 an application was moved by the petitioner seeking permission to inspect the file brought by Devender Dutt, PW-6. The file was sought for cross-examining said witness.

4. Vide impugned order dated 6.8.05, application of the petitioner was dismissed by the Special Judge

5. It is not in dispute that file in question relates to investigation conducted by the official of the respondent NCB in connection with commission of the alleged offence.

6. Learned counsel for the petitioner had raised a two-fold contention in support of his petition.

(i) That right to information is a fundamental right under Article 19(1)(a) of the Constitution of India save and except confidential documents as mentioned under Section 123 of the Indian Evidence Act. That since respondent NCB has not claimed any such protection under Section 123, petitioner is entitled to inspect the file.

(ii) That learned Special Judge failed to appreciate that file was required by the petitioner to prepare his defence. Therefore, denial of the respondent NCB to provide access to the said file to the petitioner is a violation of principles of natural justice and contrary to Article 14 and 21 of the Constitution of India.

7. Per contra, learned counsel for the respondent contended that petitioner cannot claim inspection of investigation of file as a matter of right.

8. Respondent draws attention of this court to Section 172 of the Code of Criminal Procedure which reads as under :-

> "**172. Diary of proceeding in investigation** – (1) Every police officer making an investigation under this Chapter shall day by day enter his proceeding in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.
>
> (2) Any Criminal Court may send fro the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.
>
> (3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they

> are referred to by the Court; but, if they are used by the policed officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply.

9. A plain reading of Section 172(3) makes it obvious that an accused is not entitled to see record of investigation maintained by a police officer except for the limited purposes of Section 145 and Section 161 of the Indian Evidence Act,1872.

10. The key question that arises for consideration in present case is whether provisions of Code of Criminal Procedure can be availed of for investigating, inquiring or trying of offences under any law other than Indian Penal Code.

11. To answer this question, it is necessary to note Section 4 and 5 of Code of Criminal Procedure.

> "**4. Trial of offences under the Indian Penal Code and other laws** – (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.
>
> (2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provision, but subject to any enactment fro the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.
>
> **5. Saving** – Nothing contained in this Code

> shall, in the absence of a specific provision to the contrary, affect any special or local law fro the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law fro the time being in force."

12. In *A. R. Antulay Vs. Ramdas Sriniwas Nayak* AIR 1984 SC 718, a Constitution Bench of Supreme Court while examining the similar questions with regard to applicability of Section 4 with reference to the Prevention of Corruption Act has laid down the law as under :-

> "In the absence of a specific provision made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with according to the Criminal P.C. In other words, Criminal P. C. is the parent statute which provides for investigation, inquiring into and trial of cases by criminal Courts of various designations."

13. In the decision reported as *Directorate of Enforcement Vs. Deepak Mahajan & Anr.* AIR 1994 SC 1775, Supreme Court was again concerned with the question whether provisions of Code of Criminal Procedure would be applicable to special laws, particularly FERA and Customs Act. In paras 121, 127 and 132 It was observed as under :-

> "**121.** Section 4(2) of the Code corresponds to Section 5(2) of the old Code. Section 26(b) of the Code corresponds to Section 29 of the old Code except for a slight change. Under the present Section 26(b) any offence under any other law shall,

when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is mentioned in this behalf, may be tried by the High Court or other court by which such offence is shown in the First Schedule to be triable. The combined operation of Sections 4(2) and 26(b) of the Code is that the offence complained of should be investigated or inquired into or tried according to the provisions of the Code where the enactment which creates the offence, indicates no special procedure.

x x x x x

127. To sum up Section 4 is comprehensive and that Section 5 is not in derogation of Section 4 (2) and it only relates tot he extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). In short, the provisions of this Code would be applicable to the extent in the absence of any contrary provision in the special Act or any special provision excluding the jurisdiction or applicability of the Code. In fact, the second limb of Section 4(2) itself limits the application of the provisions of the Code reading, "..... but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

x x x x x

132. For the aforementioned reasons, we hold that the operation of Section 4(2) of the Code is straightway attracted to the area of investigation, inquiry and trial of the offences under the special laws including the FERA and Customs Act and consequently S. 167 of the Code can be made applicable during the investigation or inquiry of an offence under the special Acts also inasmuch as there is no specific provision contrary to that excluding the operation of Section 167."

14. From the aforenoted judicial decisions, the ratio which emerges is that provisions of Code of Criminal Procedure shall apply during course of investigation, inquiry or trial of an offence under special laws which must of necessity include NDPS Act 1985. Consequently Section 172 Cr.P.C. shall also apply during investigation or inquiry of an offence under NDPS Act inasmuch as there is no specific provision in the NDPS Act contrary to or excluding the operation of Section 172.

15. For the aforementioned reasons, I thus hold that learned special Judge has rightly held that the petitioner is not entitled to inspect the investigation file of the case as sub-section (3) of Section 172 prohibits the same.

16. Crl.M.C. 4872/2005 is accordingly dismissed.

17. Facts pertaining to Crl.M.C. 4855/2005 are that during the course of investigation, NCB had sent to Mr.S.K.Sharma, a Handwriting Expert, certain documents which contained the admitted signatures of petitioner as also an original application dated 22.11.1987 written by petitioner in his own hand to the Deputy Director of NCB to compare the handwritings therein with the handwritings on the documents recovered from the residence of Jasbir Singh and give his opinion whether all the writings are of the same person. On

7.12.1987, Mr.S.K.Sharma, Handwriting Expert submitted the opinion report.

18. During the course of trial, Mr.S.K.Sharma, Handwriting Expert died.

19. On 28.1.2005, an application was filed by the NCB before the Special Judge, inter alia, praying that NCB be permitted to examiner another expert as their witness and petitioner be directed to give his specimen handwriting sample having the words and figures which occur in Exs.PW5/A, PW5/B, PW5/E and PW5/G and also the words and figures occurring in application dated 22.11.1987.

20. Vide order dated 6.8.2005, learned Special Judge allowed the application.

21. Learned counsel for the petitioner contended that NCB had filed application in question with a view to delay the trial of the case that learned Special Judge failed to appreciate that prosecution was launched in the year 1988 and that application in question has been filed after a lapse of 18 years. Thus, considering that speedy trial is a facet of Article 21 of the Constitution of India and noting the conduct of prosecution, learned Special Judge ought to have rejected the application of the NCB.

22. Indian Evidence Act recognizes 2 direct methods of proving the handwriting of a person :-

(i) By an admission of the person who wrote it.

(ii) By the evidence of a witness who has seen a person writing a document.

23. These are the best methods of proof of a handwriting. These apart, there are 3 other modes of proof by opinion. They are :-

(i) By evidence of a handwriting expert (Section 45)

(ii) By the evidence of a witness acquainted with handwriting of a person who is said to have written the writing in question. (Section 47)

(iii) Opinion formed by the court on comparison made by itself. (Section 73)

24. In the instant case, prosecution sought to prove handwriting of petitioner by evidence of a handwriting expert. Specimen handwriting of petitioner was obtained. After making comparison, handwriting expert submitted his opinion.

25. Before evidentiary value can be attached to the said opinion, it is essential that handwriting expert steps into the witness box and proves the said opinion.

26. Considering that handwriting expert has died, his

opinion cannot be proved by his testimony. The opinion being personal in nature, there can also be no secondary evidence of the same. Therefore, the prosecution has no option but to send specimen handwriting of the petitioner to another handwriting expert for fresh comparison.

27. Considering that earlier specimen handwriting which was obtained by the prosecution has been lost, It is logical that prosecution will have to obtain fresh specimen handwriting of the petitioner.

28. The facts and circumstances of the case as noted by me do not suggest that prosecution, i.e. NCB had filed the application in question to delay the trial of the case.

29. I find no infirmity in the impugned order.

30. Crl.M.C. 4855/2005 is also dismissed.

31. No costs.

August 30, 2007 PRADEEP NANDRAJOG, J.
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